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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-711

RUDOLPH J. GERNETH and
HENRICA J. GERNETH,
Petitioners,
v.
THE CITY OF DETROIT,
a Municipal Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL M. GLUSAC
Corporation Counsel for the
City of Detroit
THOMAS H. GALLAGHER
WILLIAM P. DORAN
DOUGLAS B. DIMITRY
Assistants Corporation Counsel
Attorneys for Respondent
708 Police Headquarters
Detroit, Michigan 48226
224-4238

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
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CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Ordinances Involved	3
Statute Involved	5
Statement of the Case	5
Reasons Why This Cause Should Not Be Reviewed By This Court	7
Conclusion	11

AUTHORITIES CITED

Cases:

Clark v Dalman, 379 Mich 251; 150 NW 2d 755 (1967)	9
H R Moch Company, Inc v Rensselaer Water Company, 247 NY 160; 159 NE 896 (1928)	7
United States v Carver, 260 US 482 (43 S Ct 181, 60 L ed 361)	10
Williams v City of Detroit, 364 Mich 231, 111 NW 2d 1 (1961)	8, 9, 10

Rules:

Rule 19, Supreme Court Rules	6, 10

Statutes and Ordinances:	Page
Municipal Code of the City of Detroit:	
Sec. 47-1-1	3, 5
Sec. 47-1-13	4
Ord. 365-G	4
Act No. 14, Public Acts of 1955, Section 752.-a863 of Compiled Laws of 1948	5
Act No. 283, Public Acts of 1909	9
Act No. 170, Public Acts of 1964	9, 10
Act No. 155, Public Acts of 1970	10
Federal Tort Claims Act, being 28 USCA #2674	10

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now Comes the City of Detroit, a municipal corporation, and files this brief in opposition to appellants' petition for a writ of certiorari for review of judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled cause on August 17, 1972.

OPINIONS BELOW

Petitioners' statements adopted and incorporated herewith.

JURISDICTION

Petitioners' statements adopted and incorporated herewith.

QUESTIONS PRESENTED

The respondent submits that the question presented by petitioners is inaccurate in that it states conclusions not justified by the pleadings or the facts. Further, it fails to consider all of the pertinent language and provisions of the ordinance in question. Accordingly, respondent restates the questions here considered as follows:

I.

Did the Opinion of the Court of Appeals for the Sixth Circuit Decided and Filed August 17, 1972, Decide an Important and Significant Point of Michigan Law in a Way that Was in Conflict with Applicable and Existing Michigan Case Law or Legislation?

Respondent contends the answer is: No.

II.

When a Municipal Corporation, Pursuant to the Terms of a Municipal Ordinance Regulating Private Guard Services and Patrol Watchmen, Licenses a Private Patrol Watchman, Does the Municipal Corporation then Assume an Obligation or Duty as an Insurer of the Private Patrol Watchman's Conduct Toward the General Public?

Respondent contends the answer is: No.

ORDINANCES INVOLVED

In addition to Section 47-1-4 of Chapter 47 of the 1964 Municipal Code of the City of Detroit, the respondent cites the following pertinent parts of said chapter as follows:

"Sec. 47-1-1. Definitions.

• • •

Private patrol watchman. Any person, in uniform or otherwise, who for hire or reward shall guard or protect any structure, premises or property by patrolling on foot or in any vehicle upon any street, highway, alley or other public place in the city, and shall include any person who, for hire or reward, shall be employed to guard, protect or maintain peace and order in or about any structure, premises or property, which is operated, maintained or conducted as a cabaret, dance hall, theatre or any other place of business, amusement, recreation or entertainment frequented by the public, including bars licensed under the provisions of article 2 of chapter 24.

The term 'private patrol watchman' shall not apply to regularly appointed police officers of the city or to any regularly appointed peace officers or law enforcement agents of the state or the United States or political subdivisions thereof or *to persons engaged in the business of protecting persons, passengers and property being transported in interstate or intrastate commerce within the city by common carrier and the protection of the property of such common carrier within the city.* (Emphasis added)

• • •

"Sec. 47-1-13. Authority to arrest or carry weapons not granted by chapter.

The granting of a license under the provisions of this chapter shall not be construed as providing any additional powers of arrest other than that granted to private persons under the statutory provisions of the state nor shall the provisions of this chapter be construed as authority or power to carry weapons contrary to the statutory provisions of the state.

"Ordinance No. 365-G

Chapter 47

Private Patrol Watchmen

AN ORDINANCE to amend Chapter 47 of the Code of the City of Detroit by repealing Chapter 47 which provided for the licensing and regulating of private patrol watchmen.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 47 of the Code of the City of Detroit is hereby repealed.
Chapter 47. Repealed.

Section 2. This ordinance is hereby declared necessary for the preservation if the public peace, health, safety and welfare of the people of the City of Detroit, and is hereby given immediate effect.

(JCC p 2013, August 20, 1968)
Passed August 27, 1968.
Approved September 3, 1968.
Published September 4, 5, 6, 1968.
Effective September 5, 1968."

(Chapter 47 has been repealed as stated above due to the enactment of preemptive legislation by the State of Michigan.)

STATUTE INVOLVED

Also involved in this case is a criminal statute, being a portion of Act No. 14 of the Public Acts of 1955, being Section 752.a863 of the Compiled Laws of 1948, and cited as follows:

> "Reckless, wanton use or negligent discharge of firearm; penalty
>
> Sec. 3. Any person who shall recklessly or heedlessly or wilfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a *misdemeanor*. P.A. 1952, No. 45, sec. 3, added by P.A. 1955, No. 14, sec. 1, Eff. Oct. 14, 1955." (emphasis added)

STATEMENT OF THE CASE

Greyhound Lines, Inc., is and was at all times material to plaintiffs' complaint a common carrier engaged in the business of transporting passengers and property in interstate and intrastate commerce with its Detroit terminal being located at 130 East Congress Street in the City of Detroit. (See Sec. 47-1-1, Ordinance involved) Some time prior to November 17, 1967, the said Greyhound Lines, Inc., had engaged the services of Samuel Williams, doing business as "Williams Private Patrol," presumably for the purpose of guarding the passengers and property of Greyhound Lines, Inc., in its terminal at 130 East Congress Street in the City of Detroit. One of the employees of Williams Private Patrol, one Willie Wilder, had been assigned by Williams Private Patrol to duty at the terminal on

November 17, 1967, and while so engaged allegedly injured the plaintiff Rudolf J. Gerneth. A prior lawsuit naming Greyhound Lines, Inc., as a defendant resulted in an out-of-court settlement to the plaintiffs Rudolf J. Gerneth and Henrica J. C. Gerneth of Four Hundred Sixty Thousand ($460,000.00) dollars.

With regard to the licensing of Willie Wilder as a "private patrol watchman," his record before the instance we are concerned with here, discloses several traffic offenses and a conviction in December, 1963, of "reckless use of firearms," which is classified as a misdemeanor (see Statute Involved), and which would not disqualify him as a private patrol watchman. However, when Wilder, with the concurrence of his employer, applied during July 1967 for a concealed weapons permit, his application was denied because of the conviction for "reckless use of firearms."

The instant suit was instituted on November 4, 1970, alleging negligence on the part of the City of Detroit, its agents, servants and employees, in licensing Samuel Williams as a private patrol service and Willie Wilder as a private patrol watchman. The suit claims damages on behalf of plaintiff Rudolf J. Gerneth in the amount of One Million, Five Hundred Thousand ($1,500,000.00) Dollars and on behalf of Henrica J. C. Gerneth, his wife, in the amount of Five Hundred Thousand ($500,000.00) Dollars.

The respondent adopts as a fair statement of the history of this case, the last two paragraphs of petitioners' Statement of the Case.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

The petitioners' application here is addressed to this court's sound judicial discretion. U. S. Supreme Court Rule 19, 28 USCA. Rule 19 suggests that the court might consider a review in the following circumstances:

"• • •

(b) Where a court of appeals . . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law; . . ."

No case involving a fact situation exactly similar to this has been cited by the petitioners. There have been a number of opinions written involving situations that are generally analogous and a number of them are cited in the opinion of the Court of Appeals and in the argument of the petitioners.

Judge Talbot Smith in the District Court opinion refers to the leading and definitive case on the subject, *H R Moch Co* v *Rensselaer Water Co*, 159 NE 896, 247 NY 160 (Ct of App, 1928); and the opinion of the Court of Appeals contains a quotation from that leading case. Thereafter, the Court of Appeals refers to generally analogous cases arising in New York State, Florida, Indiana, Arizona, Connecticut and also to several federal cases involving state questions arising in Illinois and Arizona, the majority of the decisions being unfavorable to petitioners. The petitioners in their argument refer to a similar case arising in the Supreme Court of the United States involving a suit against the Common Council of Alexandria, Virginia, said case decided adverse to the petitioners' position (pp 16, 17, petitioners' brief).

This case is not, however, being decided on its merits. The petitioners must show, in the present posture of the case, that the decision of the Court of Appeals conflicts with applicable Michigan law. Here we have a situation where the District Judge, Talbot Smith, was for many years an eminent professor of law at the University of Michigan Law School and was for a number of years a Justice of the Supreme Court of the State of Michigan. It was his finding that there was no applicable Michigan precedent. Thereafter, the Court of Appeals on page three of its opinion says:

> "A diligent search has revealed no Michigan decision which considered the issues raised in this case."

Further quoting from the opinion of the Court of Appeals, on page seven:

> "It appears to us that as a matter of public policy, absent a statement to the contrary by the legislature or the highest court of the jurisdiction involved, the imposition of liability for damages for breach of such claimed duty would be inappropriate under the circumstances of a case like this."

The petitioners seem to be arguing that the *Williams* decision (*Williams* v *City of Detroit,* 364 Mich 231, 111 NW 2d 1) somehow is dispositive of the question we are concerned with here. The fact is that the *Williams* case held as follows, at page 260:

> "Our holding herein is limited to the statement that there is no longer any judicial doctrine of governmental immunity *as to such a claim.*" (Court's emphasis)

The claim in question was one that if asserted against a private person, would clearly constitute a cause of action. It did not involve ministerial licensing by a municipal corporation nor did it involve an extension of tort law into unprecedented, uncharted areas. The effect of the *Williams* decision was the temporary abolition of the doctrine of governmental immunity, such as it was, in the State of Michigan, as it applied to ordinary tort actions, but the decision did not create new torts nor set up causes of action that had not existed before. The significance of the *Williams* case to this action is that, but for the *Williams* case, petitioners' cause of action would have been summarily dismissed. Petitioners are still required to cite precedental cases in Michigan involving routine, ministerial licensing activities by a municipal corporation.

With respect to the case of *Clark* v *Dalman,* 379 Mich 251; 150 NW 2d 755, it is a distinctively different type of case as is illustrated by the following excerpt from the case at pages 262-263:

> "A favorable-to-plaintiff view of the evidence indicates that pursuant to the contract between defendant and the City of Otsego, plaintiff, was the duly authorized inspector of the project with obligations of general inspection as well as the specific duty of inspecting the various stages of the repair operation before defendant was authorized to proceed to the next step in the repair work. Far from being a trespasser on the premises, plaintiff was at least a licensee, or possibly an invitee. The general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project, is well settled. It is clear defendant owed such a duty to plaintiff, who was lawfully on the premises at defendant's request."

The petitioners' reference to the stop sign cases at pages 13 and 14 of their brief is illustrative of the general situation with regard to this area of the law. It is Michigan law that governmental agencies are required to maintain stop signs and that has been the rule at least since the enactment of Act No. 283 of the Public Acts of 1909, commonly known as the Highway Act, the language of which has been incorporated into Act No. 170 of Public Acts of 1964, and further into Act No. 155 of Public Acts of 1970 (see page three of the opinion of the Court of Appeals).

Arguments based on the Federal Tort Claims Act would not seem to be appropriate. Firstly, it is *legislation* spelling out the rights, duties and liabilities of various parties, in contrast to the Michigan situation wherein there was no legislation as of the time of the incident we are concerned with here. Secondly, on application for writ of certiorari the rule requires that the application be grounded on an allegation that the Court of Appeals has decided ". . . in conflict with applicable state . . . law . . .," Rule 19, Supreme Court Rules; and to argue from purportedly analogous federal legislation would seem to be irrelevant and beside the point.

Finally, no matter what the merits of petitioners' case may be and regardless of how the Michigan Supreme Court might finally decide this issue should it be presented to the court, the rules of practice of the U. S. Supreme Court are capsulized in the following quotation taken from the *Williams* case at page 288:

> "Thirty-eight years ago Mr. Justice Holmes, writing for the unanimous Court in *United States v. Carver*, 260 US 482 (43 S Ct 181 67 L ed 361), repeated again what all veteran practitioners in the Federal courts know and have known from away back: 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' (page 490)."

CONCLUSION

The Petitioners having failed to cite precedental Michigan law in support of their contention and having failed to cite Michigan legislation other than the present act, which confers immunity upon municipal corporations, and petitioners having failed to cite controlling and persuasive precedent in support of their position from other jurisdictions, it is submitted that the Court of Appeals of the Sixth Circuit rendered its opinion in conformity with applicable state law and this petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL M. GLUSAC
Corporation Counsel for the City of Detroit
THOMAS H. GALLAGHER
WILLIAM P. DORAN
DOUGLAS B. DIMITRY
Assistants Corporation Counsel
Attorneys for Respondent
By /s/ THOMAS H. GALLAGHER
Assistant Corporation Counsel
708 Police Headquarters
Detroit, Michigan 48226
224-4238

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